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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN FRANCISCO DIVISION

15 IN RE: VOLKSWAGEN 'CLEAN DIESEL'
16 MARKETING, SALES PRACTICES, AND
17 PRODUCTS LIABILITY LITIGATION

18 MDL No. 02672-CRB (JSC)

19 This document relates to:

20 PLAINTIFF J. BERTOLET, INC.'S
21 NOTICE OF MOTION, MOTION, AND
22 MEMORANDUM IN SUPPORT OF
23 PRELIMINARY APPROVAL OF
24 FRANCHISE DEALER SETTLEMENT
25 AGREEMENT, PROVISIONAL
26 CERTIFICATION OF DEALER
27 SETTLEMENT CLASS, AND
28 APPROVAL OF CLASS NOTICE

29 *Napleton Orlando Imports, LLC et al. v.
Volkswagen Group of America, Inc. et al.,
Case No. 3:16-cv-02086-CRB*

30 NAPLETON ORLANDO IMPORTS, LLC
31 d/b/a NAPLETON'S VOLKSWAGEN OF
32 ORLANDO, an Illinois limited liability company,
33 NAPLETON SANFORD IMPORTS, LLC d/b/a
34 NAPLETON'S VOLKSWAGEN OF SANFORD,
35 an Illinois limited liability company, and
36 NAPLETON AUTOMOTIVE OF URBANA,
37 LLC d/b/a NAPLETON VOLKSWAGEN OF
38 URBANA, a Florida limited liability company,
39 individually, and J. BERTOLET, INC. dba J.
40 BERTOLET VOLKSWAGEN, on behalf of itself
41 and all similarly situated persons and entities,

42 Plaintiffs,
43
44 Hearing: October 18, 2016
45 Time: 8:00 a.m.
46 Court: 6, 17th Floor

47 The Honorable Charles R. Breyer

1 v.

2 VOLKSWAGEN GROUP OF AMERICA, INC., a
3 New Jersey Corporation, VW CREDIT, INC., a
4 Delaware corporation, VOLKSWAGEN AG, a
5 German corporation, ROBERT BOSCH, LLC, a
Michigan limited liability company, and ROBERT
BOSCH GmbH, a German corporation.

6 Defendants.

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NOTICE OF MOTION AND MOTION

PLEASE TAKE NOTICE that on October 18, 2016, at 8:00 a.m., or as soon thereafter as the matter may be heard by the Honorable Judge Charles R. Breyer of the United States District Court of the Northern District of California, San Francisco Division, in Courtroom 6, located at 450 Golden Gate Avenue, San Francisco, California, Plaintiff J. Bertollet, Inc., individually and on behalf of a proposed class of Volkswagen-branded franchise dealers, will and hereby does move the Court pursuant to Federal Rules of Civil Procedure 23 for an order:

- 1) preliminarily approving the proposed Franchise Dealer Class Settlement of this case with the Volkswagen Defendants;¹
- 2) Provisionally certifying the proposed Franchise Dealer Class;
- 3) Approving and directing notice to the Franchise Dealer Class; and
- 4) Scheduling a final fairness hearing.

This unopposed motion is based on this notice of motion and motion for preliminary approval of settlement, the following memorandum of points and authorities, the declarations in support, the accompanying settlement agreement and proposed form of notice, the pleadings and the papers on file in this action, and such other matters as the Court may consider.

¹ Volkswagen Defendants, as defined in the Franchise Dealer Class Action Settlement, are Volkswagen AG, Volkswagen Group of America, Volkswagen Credit Incorporated, and Volkswagen Group of America Chattanooga Operations, LLC.

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I. INTRODUCTION

Plaintiff J. Bertolet, Inc., seeks preliminary approval of its Volkswagen-Branded Franchise Dealer Class Action Settlement and Release (“Franchise Dealer Settlement”); provisional certification of a class of Volkswagen-branded franchise dealers (the “Franchise Dealer Class”); approval of class notice; and setting a schedule for final approval of the Settlement. The Settlement class is defined as all Volkswagen-branded franchise dealers in the United States as of September 18, 2016. The cash component of the Settlement in the amount of up to \$1.208 billion (assuming 100% participation of all 652 Franchise Dealer Class members) is a remarkable result which will provide an *average payout to the 652 Franchise Dealer Class members exceeding \$1.85 million each*. And there is no required claims process: every Franchise Dealer Class member who does not opt-out of the settlement will automatically receive their settlement payment. Individual Dealer Settlement payments are a multiple of the monthly financial support payments already being paid by Volkswagen to its franchise dealers, which has widespread approval among the Franchise Dealer Class members as being fair. Moreover, attorneys’ fees and expenses will be paid by Volkswagen *in addition to the Settlement benefits*, and thus will not reduce the actual cash payments to Franchise Dealer Class members.

The Franchise Dealer Settlement also provides for the continuation of certain incentive benefits to dealers, and a standstill on capital investment expenditures otherwise required in dealer franchise and transactional agreements. Specifically: (1) “VIP” and “CSI” payments will continue at their current level for 12 months following the end of the opt-out period for the Settlement; (2) any capital investment requirements in current agreements with Volkswagen may be deferred for two years at the Franchise Dealer Class member’s option; and (3) for any future transfer of a dealership proposed to Volkswagen within 1 year of the end of the opt-out period, Volkswagen will not require a capital investment by the transferee as a condition to approving the transfer.

This recovery to the Franchise Dealer Class is outstanding, particularly given the immediate need for cooperation among Volkswagen and its franchise dealers to effectuate the terms of the \$10 billion plus consumer class action settlement that this presently pending approval before this Court.

1 The proposed Franchise Dealer Settlement was reached after extensive negotiations between
 2 experienced and informed counsel, including multiple in-person meetings and subsequent
 3 discussions. Without any obvious deficiencies, the settlement agreement readily meets the
 4 standards for preliminary approval. *See Sections III & IV(A).*

5 The proposed Franchise Dealer Class readily meets the requirements of Rule 23(a) for
 6 provisional certification. With 652 class members, the numerosity requirement is met. There are
 7 ample common questions of law and fact flowing directly from Volkswagen's admitted use of a
 8 "defeat device" in over 550,000 new vehicles sold through Volkswagen-branded franchise dealers.
 9 The Franchise Dealer Class representative, J. Bertolet, Inc., brings claims identical to, and thus
 10 typical of all members of the Franchise Dealer Class. J. Bertolet's interests are directly aligned
 11 with those of the Franchise Dealer Class and he has diligently pursued this action on their behalf.
 12 Plaintiff's counsel, Hagens Berman and Bass Sox Mercer, are unquestionably qualified to serve as
 13 Franchise Dealer Class Counsel.

14 The requirements of Rule 23(b)(3) are also met in this case. The common issues of law and
 15 fact clearly predominate over any individualized issues; and a class action is the superior method of
 16 resolving these common claims for Volkswagen's 652 similarly situated franchise dealers. For
 17 these reasons, the Franchise Dealer Class should be provisionally certified. *See Section IV(B)(3).*

18 The proposed Class Notice will be provided to each of the 652 Franchise Dealer Class
 19 members. Class members are ongoing business concerns, with current or very recent contracts and
 20 ongoing business relations with Volkswagen. As such, overnight express delivery of the Class
 21 Notice to Franchise Dealer Class members (with telephonic follow-up, if necessary) will be 100%
 22 effective in reaching every member of the Franchise Dealer Class. The notice is written in plain
 23 English, clearly conveys to Franchise Dealer Class members their options and rights, and provides
 24 exactly the monetary amount and other benefits each Franchise Dealer Class member will receive
 25 from this settlement if they do not opt-out. All of this constitutes notice in the reasonable manner
 26 required under Rule 23(e). *See Section IV(C).*

Finally, Plaintiffs' Lead Counsel propose a detailed schedule providing ample opportunity for Franchise Dealer Class members to reach a decision on the Franchise Dealer Settlement, opt-out, or object, if they see fit, and for the Court to reach an informed decision on final approval of the proposed Settlement. Accordingly, Plaintiff respectfully requests an order: (1) preliminarily approving the proposed Franchise Dealer Settlement; (2) Provisionally certifying the proposed Franchise Dealer Class; (3) Approving and directing notice to the Franchise Dealer Class; and (4) Scheduling a final fairness hearing.

II. BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

By now the Court is well-acquainted with the Volkswagen emissions scandal, the facts underlying the hundreds of complaints that were filed, and the proposed Consumer Settlement and Government Settlements. On April 6, 2016, an auto group owned by Edward Napleton, with three Volkswagen-branded franchise dealerships in Florida and Illinois (“Napleton Dealerships”), filed a proposed class action against Volkswagen on behalf of a proposed class of all Volkswagen franchise dealers in the Northern District of Illinois, for, *inter alia*, the marked decrease in the value of his own, and all Volkswagen-branded franchise dealerships in the United States since disclosure of the emissions scandal. On April 20, 2016, this lawsuit (the “Napleton Action”) was transferred to the MDL for pre-trial proceedings.

As alleged in the Dealer Action, Volkswagen artificially propped up the investment value and return on Volkswagen-branded franchise dealers such that, when the emissions scandal was revealed on September 18, 2015, and in the weeks and months thereafter, Volkswagen-branded franchise dealerships plummeted in value and return on investment, causing extraordinary and ever-increasing investment damages to the owners of Volkswagen-branded franchise dealerships in the United States.

B. Procedural History

On April 6, 2016, Napleton Orlando Imports, LLC dba Napleton's Volkswagen of Orlando, Napleton's Sanford Imports, LLC dba Napleton's Volkswagen of Sanford, and Napleton

1 Automotive of Urbana, LLC dba Napleton Volkswagen of Urbana (collectively, the “Napleton VW
 2 Dealerships”) filed the Napleton Action. On April 20, 2016, the Napleton Action was transferred
 3 to the MDL for pre-trial proceedings. Declaration of Steve W. Berman (“Berman Decl.”), ¶ 2,
 4 filed concurrently herewith.

5 Prosecution of a remedy for Volkswagen-branded franchise dealers followed two distinct,
 6 but ultimately merged, tracks. First, from soon after the emissions scandal became public,
 7 Volkswagen-branded dealers nominated a “Dealer Investment Committee” (“DIC”) to engage
 8 Volkswagen in discussions concerning an appropriate remedy for U.S. franchise dealers to
 9 compensate them for the substantial losses they were experiencing—and which were increasing—
 10 they believed as a result of the emissions scandal. The DIC engaged Bass Sox Mercer (“BSM”),
 11 one of proposed Dealer Class Counsel, to represent it in negotiations with Volkswagen. Berman
 12 Decl., ¶ 3.

13 Second, Hagens Berman (“HB”), counsel for Napleton Dealerships and the other proposed
 14 Dealer Class Counsel, began extensive pre-filing investigation and research early in 2016 and
 15 continued it until shortly before filing the Napleton Action. Thereafter, HB multiplied its efforts in
 16 developing a complete picture of the emissions fraud as related to franchise dealer claims and the
 17 damages flowing therefrom, including engaging noted economic and damages experts. And given
 18 the extensive cost expected, and then confirmed, for the Consumer Lawsuits, HB took great care to
 19 assess Volkswagen’s ability to pay damages to dealers, and its need for dealer cooperation in
 20 effectuating the then-expected settlement of the Consumer Lawsuits. Berman Decl., ¶ 4.

21 On July 18, 2016, HB sent Volkswagen a request for dealer-specific document discovery.
 22 The requested documents included historical dealer-by-dealer vehicle deliveries, composite
 23 financial statements, Units in Operation figures, buy/sale agreements, and several categories of
 24 internal communication and reports relating to the projected impact on dealers from the emissions
 25 scandal. Berman Decl., ¶ 5. On July 20, 2016, HB sent Volkswagen its second request for
 26 documents, including documents relating to: dealer inventory of TDI vehicles, Letters of Intent for
 27 potential new dealerships and projections for such new dealerships, marketing planning and

1 budgeting, dealer and consumer-facing incentive programs, and certain communications between
 2 Volkswagen and its dealers. Berman Decl., ¶ 6.

3 Beginning on July 22, 2016, and continuing thereafter, Volkswagen electronically produced
 4 thousands of pages of documents, including detailed spreadsheets and financial records. Attorneys
 5 at HB reviewed the entire production, and certain portions were shared with HB's retained
 6 damages and economic experts. In addition, attorneys at Hagens Berman searched the 12 million-
 7 plus pages of electronic discovery produced in the consumer action to retrieve hundreds of
 8 documents that were particularly relevant to the Dealer Action, Volkswagen's knowledge of harm
 9 to dealers, and assessment of damages suffered by dealers. Berman Decl., ¶ 7.

10 In July 2016, after each of BSM and HB had devoted significant, non-overlapping resources,
 11 time and effort to prosecution of franchise dealer claims related to the emissions scandal, the two
 12 firms agreed to work together to efficiently forge the best possible result for all 652 Volkswagen-
 13 branded franchise dealers in the proposed Franchise Dealer Class. The two firms together had
 14 multiple meetings with Volkswagen and its attorneys from Sullivan & Cromwell ("S&C") in New
 15 York, and via telephone and electronic communications. Berman Decl., ¶ 8. After months of
 16 rigorous investigation, research, document review, consultation with experts, communication and
 17 negotiation, a settlement term sheet was agreed in late August 2016 and shared with the Court's
 18 Settlement Master, Robert S. Mueller, and then presented to the Court, which occurred on August
 19 26, 2016. *See* Dkt. No. 1774. Berman Decl., ¶ 11.

20 The Court ordered submission of a final settlement agreement and this motion and
 21 supporting documents on September 30, 2016, setting in motion a further intense flurry of work by
 22 HB, BSM, Volkswagen and its counsel at S&C. Berman Decl., ¶ 12.

23 On September 30, 2016, HB and BSM filed the Volkswagen-Branded Franchise Dealer
 24 Amended and Consolidated Class Action Complaint ("Complaint"), adding J. Bertolet, Inc., dba J.
 25 Bertolet Volkswagen as plaintiff and proposed Class Representative. The Complaint spanned 130
 26 pages and set forth in detail the allegations relating to the Franchise Dealer Class claims against
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1 Volkswagen and against Bosch. The Complaint reflects the extensive labors undertaken by HB
2 and BSM in prosecution of this action. Berman Decl., ¶ 13.

3 On September 30, 2016, the Settlement Agreement that Plaintiff now proposes for approval
4 was completed, agreed and executed. Berman Decl., ¶ 14.

5 **III. SUMMARY OF KEY SETTLEMENT TERMS**

6 **A. The Settlement Class**

7 The proposed settlement class (the “Franchise Dealer Class”) is the same class defined in
8 the Complaint:

9 All persons or entities who owned a Volkswagen-branded franchise
10 dealership that operated in the United States as of September 18,
2015.

11 Excluded from the Franchise Dealer Class are all persons who make a timely election to be
12 excluded from the Franchise Dealer Class.

13 **B. Benefits to Franchise Dealer Class Members Who Do Not Opt-Out of the Settlement**

14 **1. New Cash Payments Representing Lost Value of Dealership Investment.**

15 Volkswagen will pay a maximum amount of \$1,208,000,000.00 (assuming 100%
16 participation) to Franchise Dealer Class members who do not opt-out of the Settlement
17 (“Settlement Class Members”). The funds will be allocated to Settlement Class Members *pro rata*,
18 based upon the ratio of each dealer’s current dealer support payments from Volkswagen to the total
19 of all dealer support payments being paid by Volkswagen. No claim form is necessary, every
20 Settlement Class Member who does not opt out will automatically receive their allocated share of
21 the cash payment. On average, Settlement Class Members will receive approximately
22 \$1,850,000.00

23 Fifty percent of each Settlement Class Members’ cash benefit (the “Initial Payment”) will
24 be paid within 30 days of the Settlement Opt-Out Date, provided such Settlement Class Member
25 has executed an Individual Release (that mimics the Settlement Release described below).
26 Settlement Class Members who do not execute the Individual Release will receive their Initial
27 Payment with 30 days of the Effective Date of the Settlement. The remaining 50% of the cash
28

1 payment will be paid in 18 equal monthly installments beginning 30 days after each Settlement
2 Class Members' Initial Payment. Cash payments under the Settlement are assignable by
3 Settlement Class Members through approved buy/sale agreements of dealerships.

4 **2. Continuation of Incentives and Other Support Payments.**

5 Volkswagen agrees to continue its "VIP" and "CSI" incentive payments to Settlement Class
6 Members for at least 12 months following the Opt-Out Date. In addition, Volkswagen will
7 continue to pay its monthly dealer support payments until after the Opt-Out Date.

8 **3. Standstill of Capital Investment Obligations.**

9 To the extent any Settlement Class Member is obligated under an existing agreement with
10 Volkswagen to make capital investments (i.e., remodel, new construction, etc.) in its dealership, the
11 Settlement Class Member may defer, at its option, such obligations for two years after the Opt-Out
12 Date. Likewise, Volkswagen agrees not to require capital investment in connection with the sale of
13 a dealership for any sale that is formally proposed to Volkswagen within one year of the Opt-Out
14 Date.

15 **4. Treatment of Dealer Inventory of Volkswagen Diesel Vehicles.**

16 For used diesel vehicles for which Volkswagen is unable to provide an approved emissions
17 modification ("AEM"), Volkswagen will repurchase such vehicles from the Dealer Settlement
18 Class Member at the same gross amount that an Eligible Owner would receive (a) under the
19 Consumer Settlement Agreement for 2.0-liter used No AEM Vehicles, and (b) under a future
20 potential consumer settlement, if any, for 3.0-liter used No AEM Vehicles. For new diesel vehicles
21 with no AEM, Volkswagen will repurchase such vehicles from Dealer Settlement Class Members
22 for the net wholesale cost that was paid by the Settlement Class Member for such vehicles. For all
23 vehicles repurchased from Dealer Settlement Class Members, Volkswagen will pay the reasonable
24 carrying and storage costs of such vehicles from the date such vehicle is determined to have no
25 AEM until Volkswagen retrieves them, and if it fails to retrieve them within one year of
26 repurchase, Dealer Settlement Class Members may ship such cars to Volkswagen at its sole
27 expense.

1 For new, unused Model Year 2015 2.0L diesel vehicles for which Volkswagen is able to
2 provide an AEM, Volkswagen will offer a TDI Lease Program and a TDI Service Loan Program.
3 The TDI Lease Program will provide consumers leasing such AEM Vehicles attractive lease terms
4 with substantial subvention. The lease program will be administered by VCI, and VCI will
5 maintain ownership of the New MY15 AEM Vehicles placed into the lease program.

6 The TDI Service Loan Program will be a 12-month service loan car program for the New
7 MY15 AEM Vehicles currently in the inventory of Dealer Settlement Class Members whereby
8 Dealer Settlement Class Members will be charged a monthly rental fee below the current standard
9 price of 2% of MSRP per month, and have the option, but not the requirement, to buy such New
10 MY15 AEM Vehicles at the end of the 12-month program if all of the steps of the AEM have been
11 completed for the vehicle(s).

12 **C. Release of Claims**

13 If the settlement becomes final, Class Representative Plaintiff and Settlement Class
14 Members will release all claims in the Complaint against Volkswagen AG, Volkswagen Group of
15 America, Inc., Volkswagen Credit, Inc., and Volkswagen Group of America Chattanooga
16 Operations, LLC. Claims relating to Robert Bosch GmbH and Robert Bosch, LLC (collectively,
17 “Bosch”) are not subject to any release in the Agreement. Except for the right to assert as a
18 defense to any termination of dealership by Volkswagen, Settlement Class Members will
19 essentially wipe the slate clean as to any disputes they have with Volkswagen as of the Effective
20 Date of the Settlement.

21 **D. Notice of the Settlement**

22 Because each Franchise Dealer Class member has a present (or very recent) Dealer
23 Agreement with Volkswagen, the identity and contact information for each Franchise Dealer Class
24 member is known to Volkswagen. Volkswagen will send Class Notice via overnight express mail
25 to each Franchise Dealer Class member address of operations and notice address under the
26 applicable Dealer Agreement (if different). Volkswagen will follow up each mailing with a
27 telephone call to confirm that every member of the Franchise Dealer Class has received Class

1 Notice. HB and BSM will be available to consult with Franchise Dealer Class members
2 concerning the terms of the Settlement and their opt-out rights, should any Franchise Dealer Class
3 members so desire.

4 **E. Claims-Paid Settlement**

5 The Settlement is “claims-paid”, meaning that Settlement Class Members need not
6 complete any form or claims procedure in order to obtain their benefits under the Settlement. By
7 returning an Individual Release, as described above, Settlement Class Members will be able to
8 obtain the cash portion of the Settlement sooner, but the cash payments and all other benefits will
9 accrue to Settlement Class Members no later than the Effective Date of the Settlement, whether or
10 not the Individual Release is ever executed.

11 **F. Costs of Settlement Administration**

12 The Settlement specifies that all costs associated with administration of the Settlement will
13 be paid by Volkswagen. Under the circumstances of this case, the parties agree that a third-party
14 settlement, claims or notice administrator is not necessary.

15 **G. Attorneys’ Fees**

16 The Settlement provides that attorneys’ fees to Dealer Class Counsel shall be paid by
17 Volkswagen *in addition to the benefits provided to Settlement Class Members*. As a result,
18 Settlement Class Members’ benefits under the Settlement will not be reduced to pay attorneys’ fees
19 or reimburse litigation expenses with respect to this settlement. Volkswagen and Plaintiffs’
20 attorneys have only recently initiated discussions concerning fees and expenses and have not
21 agreed on the amount of attorneys’ fees to be paid in this case, deferring such discussions until
22 after substantive terms of the Settlement were settled.² Attorneys’ fees and expenses to be awarded
23 in this case will be subject to Court approval after opportunity for Settlement Class Members to
24 object, pursuant to Fed. R. Civ. P. 23(h).

27 ² See *In re NFL Players Concussion Injury Litig.*, 821 F.3d 410, 444-45 (3d Cir. 2016), as
28 amended May 2, 2016.

IV. ARGUMENT

A. The Court Should Preliminarily Approve the Settlement

Federal Rule of Civil Procedure 23(e) requires judicial approval of any settlement of class action claims. Approval of a settlement is a multi-step process, beginning with preliminary approval, followed by notice to the class and the filing of any objections, and concluding with a motion for final approval and fairness hearing.³ Preliminary approval is thus not a dispositive assessment of the fairness of the proposed settlement, but rather determines whether it falls within the “range of possible approval.”⁴ Preliminary approval establishes an “initial presumption” of fairness, such that notice may be given to the class and the class may have a full and fair opportunity to consider the proposed settlement.⁵

Preliminary approval of a settlement and notice to the proposed class is appropriate if the proposed settlement: (1) appears to be the product of serious, informed, non-collusive negotiations; (2) has no obvious deficiencies; (3) does not improperly grant preferential treatment to class representatives or segments of the class; and (4) falls within the range of possible approval.⁶ The “initial decision to approve or reject a settlement proposal is committed to the sound discretion of the trial judge.”⁷

As is the case here, when proposed class counsel are experienced, and support the settlement, which was reached through arms-length negotiations, a presumption of fairness applies.⁸ The final test of fairness, in the Ninth Circuit, turns on analysis of the following factors: the strength of plaintiffs' case; the risk, expense, complexity and likely duration of continued

³ See MANUAL FOR COMPLEX LITIGATION (FOURTH) § 21.632, 320-21 (2004). All internal citations and quotations omitted and all emphasis added, unless otherwise indicated.

⁴ *Id.*; see also *Collins v. Cargill Meat Solutions Corp.*, 274 F.R.D. 294, 301-02 (E.D. Cal. 2011).

⁵ *In re Tableware Antitrust Litig.*, 484 F. Supp. 2d 1078, 1079 (N.D. Cal. 2007).

⁶ See *Bickley v. Schneider Nat'l, Inc.*, 2016 WL 4157355, at *1 (N.D. Cal. Apr. 25, 2016); *Zepeda v. PayPal, Inc.*, 2015 WL 6746913, at *4 (N.D. Cal. Nov. 5, 2015); *Fraley v. Facebook, Inc.*, 2012 WL 5838198, at *1 n.1 (N.D. Cal. Aug. 17, 2012); *Tableware*, 484 F. Supp. 2d at 1079.

⁷ *Officers for Justice v. Civ. Serv. Comm'n*, 688 F.2d 615, 625 (9th Cir. 1982) ("OFJ").

⁸ See *Nobles v. MBNA Corp.*, 2009 WL 1854965, at *6 (N.D. Cal. June 29, 2009).

1 litigation; the risk of certification and maintaining class action status through trial; the discovery
 2 completed; the size of the settlement; the stage of the case at which settlement is proposed, the
 3 experience and views of counsel; government involvement in the case; and the reaction of class
 4 members to the proposed settlement.⁹ The particulars of the case and proposed settlement
 5 determine the weight to be provided each factor.¹⁰

6 In addition to substance of the settlement itself, the Court must also ensure the settlement is
 7 procedurally fair; that it is “not the product of fraud or overreaching by, or collusion between, the
 8 negotiating parties.”¹¹ Because this settlement is substantively fair when weighing the factors
 9 above, and was reached through procedurally fair, arms-length negotiations, it should be
 10 preliminarily approved.

11 **1. The Settlement Is Substantively Fair, Reasonable and Adequate Resolution of
 12 the Franchise Dealer Litigation.**

13 **a. Plaintiff’s case is strong, thus the substantial recovery is warranted.**

14 Volkswagen purposefully used the Defeat Device to obtain EPA and CARB approval for its
 15 2009-15 diesel passenger vehicles. As evidenced by the Consumer Settlements and the swift
 16 resolution of the related DOJ and FTC civil actions, there is a compelling case for liability. This
 17 liability extends to alleged investment losses suffered by owners of Volkswagen’s U.S. franchise
 18 dealers because the losses directly flow from the alleged conduct. Dealers had and still have
 19 thousands of new and used TDI cars on their lots that became immediately unsalable when
 20 Volkswagen issued its broad stop sale orders. When consumers learned of the emissions scandal,
 21 the entire market for Volkswagen’s diesel cars immediately disappeared and the tarnished brand
 22 name also caused precipitous decreases in sales of all Volkswagen cars. This factor weighs in
 23 favor of approval of the settlement because there is clear and meaningful relationship between the
 24 strength of the case and the benefits provided in the settlement.

25

26 ⁹ See *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1026 (9th Cir. 1998).

27 ¹⁰ See *OFJ*, 688 F.2d at 625.

28 ¹¹ See *id.*

b. There would be substantial risk, expense and complexity in continuing the litigation, which could last for years and would imperil the Consumer Settlements.

Notwithstanding the substantial evidence that Plaintiff can bring to bear in this case, there are always risk factors in litigation. Here, Volkswagen has already agreed to pay up to \$15 billion of settlements stemming from the diesel emissions scandal, and this is just in the United States. Volkswagen is still facing criminal probes in the U.S., and it is facing dozens of lawsuits in international fora. As such, a long complex litigation could result in a Pyrrhic victory if Volkswagen's resources are depleted in the process.¹² Moreover, Volkswagen's branded dealers are the lynchpin in its Consumer Settlements. An ongoing dealer litigation would make cooperation on the Consumer Settlements difficult, if not impossible, further imperiling Volkswagen's ability to navigate the maelstrom. This factor supports approval of the settlement because it is important not just to Class Members, but also to Volkswagen to promptly resolve this litigation.

c. The Franchise Dealer Class carries material certification risk.

While liability evidence is strong in this case, certification draws a different test and may be challenging to achieve and maintain in this case. Principal concerns are the sophistication of class members and the size of potential recoveries. Each Franchise Dealer Class Member is itself a substantial business operation that has either in-house counsel, or ready access to legal counsel that could pursue its individual case. In addition, dealers' losses are at a level that could support individual litigation—as evidenced by the fact that this settlement will provide, on average, \$1.85 million to each Franchise Dealer Class Member. As an ongoing litigation progressed, the many, varied business pressures on dealer operations could put pressure on the cohesiveness of the ongoing class. This factor supports approval of the settlement because manageability of a settlement class is not a requirement of provisional certification and at present Franchise Dealer Class Members interests and concerns are substantially aligned and cohesive.

¹² See, e.g., *UAW v. GMC*, 497 F.3d 615, 632 (6th Cir. 2007) (rejecting settlement objections premised on Plaintiff prevailing at trial because “any such victory would run the risk of being a Pyrrhic one....”).

d. Beyond the substantial discovery discussed in the Consumer Settlement, proposed Dealer Class Counsel obtained and reviewed discovery specifically geared to the unique aspects of franchise dealers' claims against Volkswagen.

Discovery reviewed in the consumer actions against Volkswagen revealed substantial and material evidence of liability and the participants in the alleged diesel fraud. But this alone was not sufficient to properly evaluate liability, causation and potential damages in franchise dealers' case against Volkswagen. As a result, proposed Dealer Class Counsel requested and obtained from Volkswagen extensive discovery relating to franchise dealers' case. All of this discovery was reviewed, and much of it was reviewed by and included within the analysis of noted economic experts who had been retained by the proposed Dealer Class Counsel. In addition, much investigation and research was directed toward the Franchise Dealer Class Members to assess the effects of the diesel emissions scandal on their operations, expectations and investment value. This factor supports approval because ample discovery was completed to properly assess the case, evaluate damages, and inform settlement discussions.

e. The settlement is by all measures substantial and adequately reflects the magnitude of harm to the Franchise Dealer Class.

The Settlement in this case is \$1,208,000,000.00 if there is 100% participation by the Franchise Dealer Class members. By any measure, it is one of the largest settlements in history. And in terms of raw size for automotive settlements it ranks behind only the Volkswagen Consumer Settlement, and the Toyota Sudden Unintended Acceleration settlement, which was approximately \$1.5 billion. And unlike those cases that had hundreds of thousands of class members that would share in the settlement, this settlement class has only 652 members, thus the average recovery by each Franchise Dealer Class Member will be about \$1.85 million, a sum that likely exceeds the amount of most class action settlements. The size of the settlement clearly supports approval of the settlement because it is extraordinary by any measure and reflects the strength of Franchise Dealer Class Members' case against Volkswagen and Volkswagen's need to have the cooperation of Franchise Dealer Class Members to effectuate the Consumer Settlement and ensure its very ongoing survival.

f. In light of the unique facts and circumstances of this case, that it is being settled at an early stage of the case is not a concern.

This case is still in an early stage. While adequate discovery to assess the adequacy of the settlement has been obtained and reviewed, there has been no motions practice yet in the case. However, the circumstances of the diesel emissions scandal, and Volkswagen's need to effectuate a prompt resolution for consumers, regulators, and dealers suggests that an early resolution of the dealer case is not only desirable, but indeed required. The ongoing viability and cooperation of Volkswagen's franchise dealer network is essential to the Consumer Settlement. For this reason, the early stage of settlement does not militate against preliminary or final approval.

g. Plaintiffs' counsel and Volkswagen counsel are highly experienced class action and automotive dealer litigators and they fully support the Settlement.

Hagens Berman is one of the most experienced plaintiffs class firms in the country, especially in the context of massive automotive class cases. Hagens Berman has had and currently has a leadership role in the largest automotive class cases in history, including *In re: Toyota SUA*, which settled for over \$1.3 billion, and *In re Hyundai/Kia MPG*, which settled for nearly \$400 million; the massive GM ignition switch case, which is currently in active litigation, and the Volkswagen consumer case, for which Hagens Berman Managing Partner, Steve W. Berman, is a member of the Plaintiffs' Steering Committee. Bass Sox Mercer is a nationwide leader in the representation of automotive dealers in lawsuits and other actions against automobile manufacturers. Its depth of knowledge and experience in the particular type of dispute at issue in this case brings necessary perspective to dealers' damages in this case and concerns about ongoing litigation. Hagens Berman and Bass Sox Mercer strongly support this settlement. It provides Franchise Dealer Class Members with genuine and substantial financial support to compensate them for the loss in the value of their dealerships. It also, through the non-monetary aspects of the Settlement, provides a cooperative path forward where Volkswagen and its dealers can work cooperatively toward remediation of the diesel emissions scandal and recovery of the brand.

1 Counsel's judgment that the Settlement is fair and reasonable is entitled to great weight.¹³
 2 "[A]bsent fraud, collusion, or the like, [the Court] should be hesitant to substitute its own judgment
 3 for that of counsel."¹⁴

4 Likewise, Volkswagen's counsel, Sullivan & Cromwell, strongly support the Settlement.
 5 As Volkswagen's counsel throughout the diesel emissions scandal, S&C is intimately familiar with
 6 the needs and resources of Volkswagen, and its goals and intentions going forward. The strong
 7 support of the very experienced counsel involved in the negotiation of the Settlement support its
 8 preliminary approval.

9 **h. The extensive involvement of government in response to the Volkswagen**
10 emissions scandal supports approval of this Settlement.

11 Government regulators and the Department of Justice did not have a direct role in the
 12 negotiation of this Settlement, yet their critical presence in the Consumer Settlement and ongoing
 13 criminal investigation support approval of this Settlement. The EPA, CARB, and the Department
 14 of Justice were a guiding force in the Consumer Settlement, which will swiftly reduce ongoing
 15 environmental damage by removing the polluting cars from the road and requiring substantial (over
 16 \$2.5 billion worth) environmental mitigation by Volkswagen. But the success of the Consumer
 17 Settlement depends on, and requires the extensive cooperation of the Franchise Dealer Class. This
 18 Settlement assures that cooperation.

19 **i. Plaintiffs' counsel are confident the Settlement will be broadly**
supported by the Franchise Dealer Class.

20 Plaintiffs' counsel, Bass Sox Mercer, was hired by the Dealer Investment Committee
 21 ("DIC") to seek a negotiated resolution with Volkswagen for all Volkswagen-branded franchise
 22 dealers. The DIC, in turn, consists of five current Franchise Dealer Class Members who were
 23 nominated to the DIC by their peers. The DIC fully support this Settlement, and based on their
 24

25 ¹³ See *Churchill Vill., L.L.C. v. GE*, 361 F.3d 566, 576-77 (9th Cir. 2004); *OFJ*, 688 F.2d at 625
 26 (same); *Ellis v. Naval Air Rework Facility*, 87 F.R.D. 15, 18 (N.D. Cal. 1980), *aff'd*, 661 F.2d 939
 27 (9th Cir. 1981) ("the fact that experienced counsel involved in the case approved the settlement
 28 after hard-fought negotiations is entitled to considerable weight").

¹⁴ *Nat'l Rural Telecomms. Coop. v. DIRECTV*, 221 F.R.D. 523, 528 (C.D. Cal. 2004) (citation omitted).

1 interactions with other Franchise Dealer Class Members, they are confident that the Settlement will
 2 receive overwhelming support from Franchise Dealer Class Members throughout the United States.

3 Thus, each of the factors to be evaluated for final approval suggest that this Settlement is
 4 substantively fair and should receive preliminary approval.

5 **2. The Settlement Is the Result of Arm's-Length Negotiations.**

6 This settlement arises out of extended, informed, arm's-length negotiations between
 7 counsel for the parties. The parties reached agreement after months of intensive investigation,
 8 dealer-specific document discovery, expert retention and consultation. As a result, Plaintiffs'
 9 Counsel had ample information to participate in an informed, and thus reasonable negotiation
 10 process.¹⁵ And with that knowledge to bring to bear, Plaintiffs' counsel held multiple settlement
 11 meetings and communications with Volkswagen's counsel, who were similarly very sophisticated
 12 and well-informed. While a neutral mediator was not present at the settlement discussions,
 13 Director Mueller, the Court's Settlement Master appointed in the MDL was provided the initial
 14 term sheet and final Settlement, and has indicated his belief that the Settlement should be submitted
 15 to the Court for approval.¹⁶

16 In short, these non-collusive and fully informed negotiations between sophisticated sets of
 17 counsel support preliminary approval of the settlement agreement. As the Ninth Circuit has stated,
 18 "We put a good deal of stock in the product of an arms-length, non-collusive, negotiated
 19 resolution."¹⁷

20 Plaintiffs respectfully request that the Court preliminarily approve the settlement
 21 agreement.

22
 23
 24
 25 ¹⁵ See, e.g., *In re Mego Fin. Corp. Sec. Litig.*, 213 F.3d 454, 459 (9th Cir. 2000) (holding
 26 "significant investigation, discovery and research" supported the district court's conclusion "that
 27 the Plaintiffs had sufficient information to make an informed decision about the Settlement").

¹⁶ See *In re Bluetooth Headset Prods. Liab. Litig.*, 654 F.3d 935, 948 (9th Cir. 2011) (finding
 the presence of a neutral mediator "a factor weighing in favor of a finding of non-collusiveness").

¹⁷ *Rodriguez v. West Publ'g Corp.*, 563 F.3d 948, 965 (9th Cir. 2009).

1 **B. The Court Should Certify the Franchise Dealer Class**

2 Class certification—whether through motions practice or uncontested in conjunction with a
 3 proposed settlement—requires: (1) that “the class is so numerous that joinder of all parties is
 4 impracticable; (2) there are questions of law and fact common to the class; (3) the claims or
 5 defenses of the representative parties are typical of the claims or defenses of the class; and (4) the
 6 representative parties will fairly and adequately protect the interests of the class.”¹⁸ Where a
 7 proposed class seeks monetary damages, and not just injunctive relief, “questions of law and fact
 8 common to class members [must] predominate over any questions affecting only individual
 9 members,” and the class action must be “superior to other available methods for fairly and
 10 efficiently adjudicating the controversy.”¹⁹ But unlike in a contested class certification process,
 11 which is a precursor to trial, a proposed settlement class does not require a showing that a trial on
 12 class claims would present no manageability issues—precisely because there will be no trial that
 13 needs to be managed.²⁰

14 **1. The Proposed Class is Ascertainable.**

15 Although not specified in Rule 23, courts imply a prerequisite that the proposed class be
 16 ascertainable.²¹ “A class definition should be precise, objective, and presently ascertainable.”²²
 17 Ascertainability is satisfied when it is “administratively feasible for the court to determine whether
 18 a particular individual is a member.”²³

19 The Settlement Class definition here utilizes objective criteria that make class membership
 20 objectively verifiable. The identity of Class members is easily ascertainable through reference to
 21

22 ¹⁸ Fed. R. Civ. P. 23(a).

23 ¹⁹ Fed. R. Civ. P. 23(b)(3).

24 ²⁰ *See Amchem Prods. v. Windsor*, 521 U.S. 591, 620 (1997).

25 ²¹ *Galvan v. KDI Distrib.*, 2011 U.S. Dist. LEXIS 127602, at *8 (C.D. Cal. Oct. 25, 2011); *In re Northrop Grumman Corp. ERISA Litig.*, 2011 U.S. Dist. LEXIS 94451, at *26 n.61 (C.D. Cal. Mar. 29, 2011).

26 ²² *Evans v. IAC/Interactive Corp.*, 244 F.R.D. 568, 574 (C.D. Cal. 2007) (internal quotations omitted).

27 ²³ *In re Northrop Grumman*, 2011 U.S. Dist. LEXIS 94451, at *26 n.61 (internal quotation omitted).

1 “objective criteria,”²⁴ because Volkswagen knows precisely who its franchise dealers are and have
 2 been. The exact identity and whereabouts of each of the 652 members of the Franchise Dealer
 3 Class is known.

4 **2. Each of the Rule 23(a) Requirements Are Met**

5 **a. The Class is so numerous that joinder is impracticable.**

6 Rule 23(a)(1) requires that the class be so numerous that joinder of all members is
 7 “impracticable.”²⁵ Numerosity “depends on the facts and circumstances of each case and does not,
 8 as a matter of law, require any specific minimum number of class members.”²⁶ Courts generally
 9 find numerosity when a class includes at least 40 members.²⁷ Class size does not have to be
 10 “exactly determined” at the certification stage; “a class action may proceed upon estimates as to the
 11 size of the proposed class.”²⁸

12 Here, the numerosity requirement is easily met because there are 652 Franchise Dealer
 13 Class Members. This number of Class members clearly makes joinder impracticable.²⁹

15 **b. Numerous common issues exist.**

16 Plaintiffs must demonstrate that there are questions of fact and law that are common to the
 17 class in order to satisfy Rule 23(a)(2). “[A] common question ‘must be of such a nature that it is
 18 capable of classwide resolution – which means that the determination of its truth or falsity will
 19 resolve an issue that is central to the validity of each of the claims in one stroke.’”³⁰ The

22 ²⁴ See *Agne v. Papa John’s Int’l*, 286 F.R.D. 559, 566 (W.D. Wash. 2012).

23 ²⁵ *Hanlon*, 150 F.3d at 1019.

24 ²⁶ *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d 1324, 1340 (W.D. Wash. 1998).

25 ²⁷ See *Z.D. v. Grp. Health Coop.*, 2012 WL 1977962, at *3 (W.D. Wash. June 1, 2012).

26 ²⁸ *Hartman v. United Bank Card Inc.*, 2012 WL 4758052, at *10 (W.D. Wash. Oct. 4, 2012).

27 ²⁹ See *Brown v. Consumer Law Assocs., LLC*, 283 F.R.D. 602, 612 (E.D. Wash. 2012) (class of 894 debt settlement customers satisfied numerosity requirement).

28 ³⁰ *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *17 (quoting *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011)).

1 “existence of shared legal issues with divergent factual predicates is sufficient, as is a common core
 2 of salient facts coupled with disparate legal remedies within the class.”³¹

3 Commonality is liberally and permissively construed.³² It requires only “a single
 4 *significant* question of law or fact.”³³ A defendant’s actions need not affect each Class member in
 5 the same manner and individual differences in damages will not defeat class treatment.³⁴

6 This litigation centers around one single and common core question: whether Volkswagen
 7 defrauded consumers, government regulators and its own franchise dealers by installing and
 8 utilizing illegal defeat device software to fraudulently obtain the EPA required Certificates of
 9 Compliance. The relatively low commonality hurdle is satisfied here. The claims of all Franchise
 10 Dealer Class Members involve this same overriding question. This issue is central to this case and
 11 is sufficient to establish commonality.

12 **c. The Class Representative’s claims are typical of those of other Class
 13 members.**

14 Rule 23(a)(3) requires that the class representative’s claims are typical of the class. “The
 15 test of typicality ‘is whether other members have the same or similar injury, whether the action is
 16 based on conduct which is not unique to the named plaintiffs, and whether other class members
 17 have been injured by the same course of conduct.’”³⁵ “Typicality refers to the nature of the claim
 18 or defense of the class representative, and not to the specific facts from which it arose or the relief

21 ³¹ *Rivera v. Bio Engineered Supplements & Nutrition, Inc.*, 2008 U.S. Dist. LEXIS 95083, at
 22 *15 (C.D. Cal. Nov. 13, 2008) (quoting *Hanlon*, 150 F.3d at 1019).

23 ³² *Hanlon*, 150 F.3d at 1019; *see also Kirkpatrick v. Ironwood Commc’ns, Inc.*, 2006 U.S. Dist.
 24 LEXIS 57713, at *11-14 (W.D. Wash. Aug. 16, 2006); *Rodriguez v. Carlson*, 166 F.R.D. 465, 472
 25 (E.D. Wash. 1996).

26 ³³ *Abdullah v. U.S. Sec. Assocs.*, 731 F.3d 952, 957 (9th Cir. 2013) (emphasis in original); *accord*
 27 *Roshandel v. Chertoff*, 554 F. Supp. 2d 1194, 1203 (W.D. Wash. 2008), *amended in part*, 2008 WL
 28 2275558 (W.D. Wash. June 3, 2008).

29 ³⁴ *Smith v. Univ. of Wash. Law Sch.*, 2 F. Supp. 2d at 1342; *Brown*, 283 F.R.D. at 612 (citing
 30 *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1026 (9th Cir. 2011)).

31 ³⁵ *Ellis v. Costco Wholesale Corp.*, 657 F.3d 970, 984 (9th Cir. 2011) (quoting *Hanon v.*
 32 *Dataproducts Corp.*, 976 F.2d 497, 508 (9th Cir. 1992)).

1 sought.”³⁶ “Under the ‘permissive standards’ of this Rule, ‘representative claims are ‘typical’ if
 2 they are reasonably co-extensive with those of absent class members; they need not be substantially
 3 identical.”³⁷ The “focus should be on the defendants’ conduct and plaintiff’s legal theory, not the
 4 injury caused to the plaintiff.”³⁸

5 The proposed Class Representative here is J. Bertolet Volkswagen. Bertolet’s claims arise
 6 from a common course of conduct of Volkswagen and a common legal theory. His interests are
 7 typical of and closely aligned with those of the absent Class members. J. Bertolet Volkswagen is a
 8 Volkswagen-branded franchise dealer who, like every Franchise Dealer Class member, sells
 9 Volkswagen cars to consumers. He, and every Franchise Dealer Class member, was injured by
 10 Volkswagen’s diesel emissions scandal, and particularly the stop sale order on all Volkswagen
 11 diesel cars, and the precipitous decline in the value of the Volkswagen brand. Thus, because
 12 J. Bertolet’s claims rely on facts and legal theories identical to those of the Class, the typicality
 13 requirement is satisfied.

14 **d. The Class Representative and its counsel adequately represent the
 15 interests of the Class.**

16 Rule 23(a)(4) requires that the representative parties fairly and adequately protect the
 17 interests of the class. The relevant inquiries are: “(1) do the named plaintiffs and their counsel
 18 have any conflicts of interest with other class members and (2) will the named plaintiffs and their
 19 counsel prosecute the action vigorously on behalf of the class?”³⁹

20 Here, the proposed Class representative is committed to the action and has devoted
 21 substantial time to assisting counsel with this action, providing documents and reviewing
 22 pleadings. Berman Decl., ¶ 15. The proposed Class representative has no interests that are
 23

24 ³⁶ *Id.*

25 ³⁷ *Galvan*, 2011 U.S. Dist. LEXIS 127602, at *18 (quoting *Hanlon*, 150 F.3d at 1020).

26 ³⁸ *Costelo v. Chertoff*, 258 F.R.D. 600, 608 (C.D. Cal. 2009) (quoting *Simpson v. Fireman’s Fund Ins. Co.*, 231 F.R.D. 391, 396 (N.D. Cal. 2005)).

27 ³⁹ *Ellis*, 657 F.3d at 985 (quoting *Hanlon v. Chrysler Corp.*, 150 F.3d 1011, 1020 (9th Cir. 1998)); *see also Galvan*, 2011 U.S. Dist. LEXIS 127602, at *20.

1 antagonistic to other Class members, and in fact shares a strong and identical interest in protecting
 2 Class members and the Volkswagen community as a whole. Berman Decl., ¶ 16.

3 Similarly, class counsel are well qualified, possess no conflicts of interest, and have already
 4 proven capable of prosecuting this action vigorously on behalf of the Class. Plaintiffs' counsel has
 5 litigated this action along both its prongs since its inception. Hagens Berman thoroughly
 6 investigated then filed the first franchise dealer action stemming from the diesel emissions scandal,
 7 and Bass Sox Mercer was retained by the Dealer Investment Counsel, a group of Volkswagen
 8 dealers that were nominated by Franchise Dealer Class members to represent their interests in
 9 discussions with Volkswagen. While Hagens Berman has extensive experience in handling
 10 complex commercial litigation, including class actions;⁴⁰ Bass Sox Mercer has represented auto
 11 dealerships in disputes with manufacturers for years and are widely regarded as one of the
 12 country's preeminent dealer-side law firms.⁴¹ By melding the firms' expertise in this action, there
 13 can be no question that they are adequate.

14 **3. The Requirements of Rule 23(b)(3) Are Met.**

15 A class may be certified under Rule 23(b)(3) when "questions of law or fact common to the
 16 class members predominate over any questions affecting only individual members" and the class
 17 action mechanism is "superior" to other methods of adjudicating the controversy.⁴²

18 **a. Common issues of law and fact predominate.**

19 "The predominance inquiry ... asks whether proposed classes are sufficiently cohesive to
 20 warrant adjudication by representation."⁴³ "The focus is on the relationship between the common
 21 and individual issues."⁴⁴ Here the common issues of law and fact clearly predominate over issues

22 ⁴⁰ See Berman Decl., Ex. A (HB Firm Resume).

23 ⁴¹ See Berman Decl., Ex. B (BSM Firm Resume).

24 ⁴² Fed. R. Civ. P. 23(b)(3).

25 ⁴³ *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1019 (9th Cir. 2011).

26 ⁴⁴ *Id.*

1 affecting only individual plaintiffs. The common issues are Volkswagen's development and use of
 2 the Defeat Device, resulting stop sale orders and brand damage. The individual issues are each
 3 franchise dealer's interactions with Volkswagen. But the latter will have little effect, if any, on
 4 damages or any other aspect of the case because the allegations against Volkswagen simply do not
 5 turn on the identity or any individual characteristics of the franchise dealer. Every Volkswagen-
 6 branded franchise dealer was subject to the stop sale orders, everyone had to hold the frozen
 7 inventory of diesels, and everyone suffered huge losses in brand value when the diesel emissions
 8 scandal was exposed. It is difficult to imagine a single individual dealer issue that would affect, let
 9 alone predominate, the overriding common issue of development and use of the Defeat Device.

10 **b. The class action mechanism is superior to any other methods of
 11 adjudication.**

12 The "superiority" element is satisfied because, through class certification, the nature,
 13 knowledge of Volkswagen, intent, and effect of the Defeat Device can be determined in one
 14 proceeding for Volkswagen-branded franchise dealers. "When common questions present a
 15 significant aspect of the case and they can be resolved for all members of the class in a single
 16 adjudication, there is clear justification for handling the dispute on a representative rather than on
 17 an individual basis."⁴⁵ Also, in this case, the fact that 652 individual claims "would not only
 18 unnecessarily burden the judiciary, but would prove uneconomic for potential plaintiffs" weighs
 19 heavily in favor of a class action.⁴⁶ While the payments each Settlement Class Member will
 20 receive in this case are large, each such dealer has an ongoing and vital relationship with
 21 Volkswagen. Litigating an individual case against their sole supplier of inventory is a highly
 22 undesirable, and risk-fraught endeavor. Moreover, Volkswagen needs the cooperation of its dealer
 23 network to effectuate the terms of the massive Consumer Settlement and government consent
 24 decree. Such cooperation would be difficult, perhaps impossible, if Volkswagen were engaged in
 25 hundreds of dealer lawsuits.

26
 27 ⁴⁵ *Hanlon*, 150 F.3d at 1022.
 28 ⁴⁶ *See id.* at 1023.

1 A class action is superior here, not only based on judicial economy, but because it truly
 2 represents the only option for franchised dealers and Volkswagen alike to resolve the claims and
 3 move forward in a cooperative manner that helps sustain the franchise dealers and Volkswagen and
 4 its ability to effectuate the Consumer Settlement and ameliorate the environmental damage from its
 5 diesel vehicles.

6 For these reasons, the proposed Franchise Dealer Class meets the requirements of Rule
 7 23(a) and 23(b)(3) and the Court should grant provisional certification for purposes of effecting the
 8 proposed Settlement.

9 **C. The Proposed Manner and Form of Notice Satisfies Rule 23**

10 Rule 23(e)(1) requires that a court approving a class action settlement “direct notice in a
 11 reasonable manner to all class members who would be bound by the proposal.”⁴⁷ A class action
 12 settlement notice “is satisfactory if it generally describes the terms of the settlement in sufficient
 13 detail to alert those with adverse viewpoints to investigate and to come forward and be heard.”⁴⁸

14 The proposed plan for notice will be 100% effective in alerting each Franchise Dealer Class
 15 Member to the Settlement and its terms. It is necessarily then “the best notice that is practicable
 16 under the circumstances.”⁴⁹

17 Moreover, the proposed notice of settlement follows, as closely as possible, the language
 18 recommended by this District’s Procedural Guidance for Class Action Settlements⁵⁰ and required
 19 by the Ninth Circuit.⁵¹ There will be links to the Settlement website that will contain the notice of
 20 settlement, key court documents, and other important information about the case. With this

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⁴⁷ Fed. R. Civ. P. 23(e)(1).

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⁴⁸ *Churchill Vill.*, 361 F.3d at 575; *see also* Fed. R. Civ. P. 23(c)(2)(B) (describing specific
 25 information to be included in the notice).

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⁴⁹ Fed. R. Civ. P. 23(c)(2)(B).

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⁵⁰ *See* <http://www.cand.uscourts.gov/ClassActionSettlementGuidance> (last visited August 4,
 28 2016).

29

⁵¹ *E.g.*, *In re Online DVD Rental Antitrust Litig.*, 779 F.3d 934, 946 (9th Cir. 2015); *Lane v.*
 30 *Facebook, Inc.*, 696 F.3d 811, 826 (9th Cir. 2012); *Rodriquez*, 563 F.3d at 962.

1 motion, plaintiffs provide their proposal for the notice of settlement, which Volkswagen has
 2 reviewed and also approves.⁵²

3 Courts have found that notice plans estimated to reach a minimum of 70 percent are
 4 constitutional and comply with Rule 23. Here, the notice will reach 100% of the Franchise Dealer
 5 Class. These notice provisions meet the requirements of Rule 23 and will allow the Class a full
 6 and fair opportunity to review and respond to the proposed settlement.

7 **D. The Proposed Schedule for Dissemination of Notice and Final Approval**

8 Plaintiffs propose the following schedule for the dissemination of class notice and final
 9 approval:

Event	Deadline
Hearing and order re preliminary approval	
Notice to be sent by overnight express carrier to each Franchise Dealer Class member and settlement website to be launched	[one week from preliminary approval order]
Last day for motion for attorneys' fees, costs, expenses, and service awards	[two weeks before objection deadline]
Last day to file objections to the settlement or requests for exclusion from the class ("Opt-Out Date")	[45 days from notice]
Last day for motion in support of final approval of settlement	[two weeks after objection deadline]
Last day for response to objections, reply in support of motion for final approval, and reply in support of motion for attorneys' fees, costs, expenses, and service awards	[one week prior to the final fairness hearing]
Final Fairness Hearing	[three weeks after motion for final approval], unless otherwise ordered by the Court

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 28 ⁵² The Class Notice is attached as Exhibit 1 to the Settlement Agreement.

V. CONCLUSION

With this Settlement, plaintiffs have secured recovery of \$1,208,000,000.00 for Franchise Dealer Class members plus valuable non-cash benefits limiting pending capital investment requirements. The Settlement will assure the ongoing success and vitality of Volkswagen's dealer network and cement their cooperation in the Consumer Settlement and amelioration of the environmental damage caused by Volkswagen's alleged defeat device fraud. The Settlement was reached only after extensive arms-length negotiations and is supported by the Court's Settlement Master. Plaintiffs respectfully request that this Court enter an order: (1) preliminarily approving the proposed class action settlement; (2) provisionally certifying the Franchise Dealer Class; (3) approving the manner and form of notice; and (4) setting a final fairness hearing.

DATED: September 30, 2016.

HAGENS BERMAN SOBOL SHAPIRO LLP

By /s/ Steve W. Berman

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MOTION FOR PRELIMINARY APPROVAL
OF FRANCHISE DEALER SETTLEMENT
Case No. 02672-CRB (JSC)
010525-11 896005 V1

CERTIFICATE OF SERVICE

I hereby certify that on September 30, 2016, I electronically transmitted the foregoing document to the Court Clerk using the ECF System for filing. The Clerk of the Court will transmit a Notice of Electronic Filing to all ECF registrants.

/s/ Steve W. Berman
STEVE W. BERMAN

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